

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN POSTAL WORKERS UNION,
LOCAL 4321,
(United States Postal Service)

and

Case 05-CB-265030

TERRY J. HIGGINS,
An Individual

Benjamin W. Palewicz, Esq., for the General Counsel.
Ashley A. Bosche, Esq., (*Cockey, Brennan & Maloney, P.C., Salisbury, Maryland*)
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried by Zoom video technology on June 4, 2021. Terry J. Higgins filed the charge giving rise to this case on August 21, 2020. The General Counsel issued a complaint on April 9, 2021. He alleges that Respondent Union violated Section 8(b)(1)(A) by failing to file a timely grievance over Higgins' 14-day suspension in April-May 2020. The General Counsel also alleges that Respondent violated the Act by failing to provide Higgins with a copy of the Union's settlement with the Employer, the United States Postal Service, as he requested.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent Union I make the following

FINDINGS OF FACT

I. JURISDICTION

The employer, the United States Postal Service, has its headquarters in Washington, D.C. It provides postal services throughout the United States, including from its Eastern Shore Processing and Distribution Center in Easton, Maryland. The Board has jurisdiction over the Employer and Respondent Union pursuant to Section 1209 of the Postal Reorganization Act. The Respondent, Local 4321 of the American Postal Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party, Terry Higgins, works as a mail processing clerk at the United States Postal Service's Eastern Shore Processing and Distribution Center in Easton, Maryland. Prior to
 5 March 2021 he worked as a mail expeditor on the night shift. In that position, his work week started at 10:00 p.m. on Sunday and ended at 6:30 a.m. Friday morning. Katrina Jones, a manager of distribution operations, was Higgins' supervisor in his expeditor position.

10 On March 19, 2020, Jones called Higgins to a pre-disciplinary interview to discuss his attendance. Higgins was accompanied by Marvin Jenkins, a union steward for APWU Local 4321, which represents him. At this meeting, Higgins stated that 2 of the absences for which Katrina Jones proposed discipline were covered by pending FMLA (The Family and Medical Leave Act) requests.¹ Higgins had applied for FMLA leave through an automated program. Jones replied that she did not see such an application on her computer. Marvin Jenkins asked
 15 Higgins if he had any documentation regarding FMLA leave. Higgins testified that he gave Jenkins what documentation he had the next day.

By letter dated March 24, 2021, the Postal Service suspended Higgins for 2 weeks without pay for attendance issues. He received this letter on April 2. The letter stated that, "if a
 20 timely grievance is initiated, the effective date of the suspension will be delayed until after the Step 2 decision has been rendered," G.C. Exh. 3. The suspension was to begin 15 days from the date of the March 24 letter. Higgins called steward Marvin Jenkins on April 2, to inform him that he had been suspended. Jenkins told Higgins that the Union would file a grievance on his behalf. The Union did not do so.²

25 Despite telling Higgins that he would file a grievance, Marvin Jenkins did not do so. He had never filed one before. His practice was to ask the chief steward to file grievances. Chief Steward Sophia Scott normally files grievances on behalf of unit employees. She and Higgins worked with one another on the loading dock at one point and do not get along with one another. Scott testified that Marvin Jenkins told her that he was handling Higgins' grievance. Marvin
 30 Jenkins' testimony on this point at Tr. 82-83 is very confusing. It is not clear whether Jenkins asked Scott to file a grievance, merely assumed that she would do so, or simply assumed Higgins would not be suspended until his FMLA claim was resolved. Jenkins was aware that Higgins and Scott harbored some mutual hostility.

35 At some point, Scott called Sean Seldon, then vice-president of Local 4321. She testified that Seldon told her that he would handle the matter. It appears that Scott called Seldon after the time in which a grievance could be filed.

40 In sum, Jenkins never filed a grievance on Higgins behalf despite having told him that he was going to do so. Additionally, either he didn't ask Chief Steward Scott to file the grievance, or he asked her and she just didn't do it because she doesn't like Higgins, or he assumed Higgins

¹ February 18 and March 12, 2020

² In its brief the Union states that the Postal Service could or would have suspended Higgins even if the 2 absences were covered by FMLA, because other absences were not. The record does not establish that this is necessarily so.

would not be suspended even if no grievance was filed. None of his assumptions were reasonable unless he asked Scott to file a grievance and she did not do it out of spite towards Higgins.

5 On April 16, the time for filing a grievance was about to expire. Jenkins and Higgins went to see supervisor Katrina Jones to ask for an extension of time in which to file a grievance until either the Union or Higgins could provide documentation for Higgins' claim to FMLA leave. Katrina Jones told them she was fine with the extension.

10 Chief Steward Sophia Scott filed for the extension, which was granted to April 23. She gave the extension document to Marvin Jenkins, who told her he would ask for an extension beyond April 23. Jenkins did not do so on time.

15 The Postal Service notified Higgins by letter dated April 24, that his suspension would begin on April 27 and that he could return to work at 10:00 p.m. on Sunday, May 10, G.C. Exh. 4. Higgins notified Jenkins, who then went to Dr. Rainey, the assistant plant manager. Rainey told Jenkins that there was nothing he could do about Higgins' suspension because it was too late to file a grievance. Marvin Jenkins asked Katrina Jones for a second extension. She also told him it was too late.

20 On April 3, Higgins submitted written documentation to support his claim for FMLA leave. He testified that he had submitted this documentation to the Department of Labor Wage and Hour Division in Greensboro, NC earlier. His FMLA leave request was approved on April 7. It is unclear when either the Union or the USPS was informed of this approval.

25 Sophia Scott notified Union Vice-President Scott Seldon of Higgins' suspension after the time for filing a grievance had expired. Seldon negotiated a modification to Higgins' suspension with assistant plant manager Rainey and/or Katrina Jones, despite the fact that the Union never filed a grievance. Management agreed that Higgins would not have to serve the second week of his suspension and that it would be a "paper suspension." Per the agreement, Higgins was supposed to return to work on May 5. The Union agreed to pay Higgins' wages for the first week of his suspension. According to Higgins, he was not notified of this agreement until May 5 or 6. By that time, he had already missed 2 days of the second week of the suspension.

35 On May 6, Bonnie McCaslin, the Secretary to the plant manager, called Higgins to inform him he could return to work that evening at 10 p.m. Higgins returned to work on May 10, as stated in the written instructions he received from the Postal Service. According to McCaslin, she tried to contact Higgins for 3 days in a row and that he did not return her calls. At some point, she left him a voice mail message informing him that he could return to work on May 6.

40 Higgins returned to work on May 10, when the suspension ended. He testified that he was afraid to return to work earlier without written instruction from the USPS to do so. He told Sean Seldon that he wanted everything connected to his suspension to be in writing, Tr. 40. At some point, Higgins also requested a copy of the written settlement from his supervisor, Katrina Jones. Jones told Seldon that Higgins wanted a copy of the settlement agreement. Seldon told Higgins he'd get his paperwork when he returned to work, Tr. 71, 98-99, 112. Higgins never

received a copy of the settlement from the Union, but ultimately received one from the Postal Service.

On May 12, Higgins received a certified letter from the Postal Service dated May 8, telling him he must return to work on May 10. In July, Katrina Jones, his supervisor, gave Higgins a copy of the agreement between the Postal Service and the Union changing the 2d week to a paper suspension.

The applicable legal standard

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization “to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act.” Section 8(b)(1)(A) creates a duty, when a union is acting as an exclusive bargaining representative, to fairly represent all employees in the bargaining unit and to refrain from any action against an employee based upon considerations or classifications that are arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); see also *Operating Engineers Local 181 (Maxim Crane Works)*, 365 NLRB No. 6 (2017).

The Supreme Court has long held that a union is afforded wide latitude in carrying out its representational duties. See *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 374 (1990), citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Vaca v. Sipes*, above at 191; see also *Operating Engineers Local 181*, above. As the Court stated in *Airline Pilots Assn. v. O'Neill*, 499 U.S. 65, 78 (1991), regarding a union's negotiated strike settlement, an examination of a union's performance “must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.” To be found arbitrary, the union's behavior must have been “so far outside a “wide range of reasonableness” that it is wholly ‘irrational’ or ‘arbitrary.’” *Airline Pilots Assn.*, above at 66, citing *Ford Motor Co.*, above at 338.

Thus, a union enjoys a wide range of discretion in determining whether and how to handle employee grievances, provided the exercise of such discretion is not based on discriminatory, arbitrary, or bad-faith considerations. *Office Employees Local 2*, 268 NLRB 1353, 1355 (1984), *affd. sub nom. Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985), citing *Teamsters Local 692 (Great Western)*, 209 NLRB 446 (1974); see also *Turner v. Air Transport Dispatchers' Assn.*, 468 F.2d 297, 299 (5th Cir. 1972).

Something more than mere negligence, poor judgment or ineptitude in grievance handling is needed to establish a breach of a union's duty of fair representation, *American Transit Union, Local 1498*, 360 NLRB 777 (2014).

Respondent Union knew or had reason to know as early as March 19, 2020, that Higgins' grievance was at least in part, meritorious. That it did not file a grievance on his behalf under the circumstances was at best gross negligence and thus a violation of Section 8(b)(1)(A). Moreover, given the fact that Sophia Scott and Marvin Jenkins had actual authority to file grievances, they were acting as the Union's agent in failing to file a grievance on behalf of Terry Higgins, *Teamsters Local 866, (Lee Way Motor Freight)* 229 NLRB 832, 833 (1977). That they departed from the normal practice due to Scott's personal animosity towards Higgins amounts to

arbitrary behavior that violates Section 8(b)(1)(A), *United Steelworkers of America, AFL-CIO (Inter-Royal Corp.)*, 223 NLRB 1184 (1976). Both Jenkins and Scott had a duty to insure that a timely grievance was filed. Jenkins had such a duty because he told Higgins that he would file one; Scott had such a duty because that was generally her responsibility. Neither did so either
 5 due to gross negligence or intentionally and in bad faith.

The Union defends its actions on the grounds that Terry Higgins was not forthcoming with additional information after March 19. Despite this, I find it violated the Act because the Union told Higgins it would file a grievance on his behalf and did not do so for reasons that were
 10 either irrational, grossly negligent or intentional.

The Union violated the Act in failing to provide Terry Higgins a copy of the settlement between it and the USPS

It was not unreasonable for Terry Higgins to require written notification that he could return to work earlier than was stated in the USPS suspension letter. Respondent breached its duty of fair representation in failing to provide Higgins with a copy of its settlement with the Postal Service. The document specifically pertained to Higgins; he had an obvious legitimate interest in obtaining a copy of the settlement; the Union has not raised a countervailing reason in
 15 failing to provide Higgins with a copy; and finally, Higgins was not asking for an unreasonably large number of documents, *Letter Carriers Branch 529*, 319 NLRB 879, 880-881 (1995).
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Remedy

Having found that the Respondent, Local 4321 of the American Postal Workers Union engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It shall make Terry Higgins whole for any loss of earnings and other benefits suffered as a result of the Union's failure to file a grievance over his 2-week suspension in the Spring of 2020 plus interest
 25 compounded daily. It shall also compensate Terry Higgins for any adverse tax consequences that may result from receiving a lump-sum award.
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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³
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ORDER

Respondent, Local 4321 of the American Postal Workers Union its officers, agents, and representatives, shall
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1. Cease and desist from

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (a) Failing to file a grievance on behalf of any unit employees due to personal animus towards that individual, or as a matter of gross negligence, or any other reason that is arbitrary, discriminatory, or in bad faith..
- (b) Failing to provide employees copies of requested documents relevant to any grievance or potential grievance that the employee (s) has against the employer.
- (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Respondent Local 4321 of the American Postal Workers Union shall make Terry Higgins whole for any loss of earnings and other benefits suffered as a result of the Union's failure to file a grievance over Terry Higgins' April 2020 suspension in the manner set forth in the remedy section of the decision. It shall also compensate him for any adverse tax consequences of receiving a lump-sum award.
- (b) Within 14 days after service by the Region, Local 4321 shall post at its offices copies of the attached notices marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and/or members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has ceased to represent employees at the USPS Easton, Maryland Processing and Distribution Center, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all members and unit members who have worked at the USPS Processing and Distribution Center at any time since April 24, 2020.
- (c) Respondent Local 4321 shall preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 21 days after service by the Region, Respondent Local 4321 shall file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. July 27, 2021

A handwritten signature in cursive script, reading "Arthur J. Amchan". The signature is written in black ink and is positioned above a horizontal line.

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO UNIT MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse or fail to file a grievance on your behalf due to the personal animosity towards you of any union official or shop steward or fail to do so due to our gross negligence, or any other reason that is arbitrary, discriminatory, or in bad faith.

WE WILL NOT refuse or fail to provide you with any documentation you request that pertains to a grievance that affects you personally.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Terry Higgins whole for any loss of earnings and other benefits resulting from our failure to file a grievance over his suspension in the Spring of 2020, plus interest compounded daily.

**AMERICAN POSTAL WORKERS UNION,
LOCAL 4321,(United States Postal Service**

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/05-CB-265030 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.